# In the Supreme Court of the United States

**October Term, 1954.**

ALFRED H. OSBORNE, *Petitioner*,

vs.

ARVID OWSLEY, Sheriff of Jackson County, Respondent.

*On Petition for a Writ of Certiorari to the Supreme Court of Missouri.*

## BRIEF FOR RESPONDENT IN OPPOSITION.

No. 123.

### Questions Presented.

1. Did the Supreme Court of Missouri, in exercising its constitutional superintending control to review the habeas corpus proceedings in the Kansas City Court of Appeals, deny petitioner due process of law because of his alleged lack of knowledge of the review proceedings?

2. Did petitioner waive and abandon any constitutional objections relating to the alleged prejudice of the trial judge by his failure to appear in the Court of Appeals and in the Supreme Court of Missouri?

3. Does the Fourteenth Amendment require the state to provide a jury trial and other procedures applicable to criminal prosecutions in constructive contempt proceedings, or forbid the state from classifying petitioner's conduct as a contempt of court?

## STATEMENT.

On November 15, 1951, Judge Paul A. Buzard, Judge of Division 8, Circuit Court of Jackson County, Missouri, appointed three members of the Bar as *Amici Curiae* to investigate information which led that Court to believe that certain contempts of court may have occurred in connection with the cause of *Ernest Smith* v. *Kansas City Public Service Company* (Tr. 66). Even before *Amici Curiae* could complete their investigation and make their report, petitioner Osborne had on November 29, 1951 voluntarily surrendered to the Supreme Court of Missouri his license to practice law. *Osborne* v. *Purdome*, 244 S. W. 2d 1005, 1016 (no official report), cert. den. 343 U. S. 953.

On January 28, 1952, a complaint for criminal contempt was filed against petitioner and other lawyers and laymen, charging them with conspiracy to impede and obstruct the administration of justice in the case of *Ernest Smith* v. *Kansas City Public Service Co.* The complaint alleged in substance that petitioner and other lawyers had induced, hired, coached, and rehearsed the lay contemnors to testify falsely in said case as pretended eyewitnesses to the collision out of which the case arose, although none of the lay contemnors was in fact an eyewitness to the collision and none had any personal knowledge thereof (R. 16-19).

A full hearing and trial of the contempt proceedings at which petitioner appeared *pro se* was held from March 10-14, and March 17-21, 1952, a period of ten days (R. 67). Five of the lay contemnors testified in said trial and in addition to their testimony, other witnesses testified and numerous exhibits were introduced, including a partial transcript of the record in the *Smith* case, which in-

cluded the testimony of all the lay contemnors. The voluntary sworn statement of attorney Ponick, which confessed his guilt of the contempt charges, was received in evidence against Ponick only. At the conclusion of the trial, the court applied the criminal standard of quantum of proof, found that the evidence established beyond reasonable doubt that the petitioner and certain other contemnors were guilty of contempt of court as charged, and sentenced petitioner to 360 days in jail and to pay a fine of $1,000 (R. 64-71). The trial court, being advised that petitioner Osborne intended to file an application for Writ of Habeas Corpus, ordered execution of its judgment delayed for one week, until April 18, 1952, and fixed petitioner's bond at $3,000 (R. 73-74).

On April 18, 1952, petitioner filed his petition for a Writ of Habeas Corpus in the Kansas City Court of Appeals and was immediately admitted to bail (R. 74). No part of the trial of the contempt proceedings was included or referred to in his petition, and the transcript of the proceedings was not included in the record in the habeas corpus proceedings.

The return of the sheriff was filed April 26, 1952 (R. 76), and petitioner's answer to the return was filed June 2, 1952 (R. 78). Neither the petition nor the answer requested the appointment of a commissioner to take testimony on issues of fact. After petitioner filed his answer he took no further steps in the proceedings, and did not appear at any of the hearings in the proceedings either in the Kansas City Court of Appeals or in the Missouri Supreme Court, until January 26, 1954, nineteen months later, at which time petitioner filed a motion for rehearing in the Supreme Court of Missouri. Petitioner did not appear in the Court of Appeals on the date when his case, No. 21,814, was set for oral argument. Petitioner filed no briefs in the Court of Appeals and never re-

quested the appointment of a special commissioner to take testimony therein, in accordance with the well-settled procedure in appellate courts in Missouri.

Co-contemnor Duke W. Ponick did appear, briefed and argued his cause in the Court of Appeals in *Duke W. Ponick* v. *J. A. Purdome, Sheriff,* No. 21,811. The Court of Appeals held that Ponick was entitled to be discharged on the ground that the contempt proceeding was barred by a misdemeanor statute of limitations. 254 S. W. 2d 673. Notwithstanding Osborne's default, the Court of Appeals *sua sponte* held that the *Osborne* case involved the same question as the *Ponick* case, and that Osborne was also entitled to be discharged (R. 3; 254 S. W. 2d 676).

In accordance with the procedure established by Article V, Section 10 of the Missouri Constitution of 1945, and Supreme Court Rule 2.06 (Appendix, p. 31), respondent duly filed in the Kansas City Court of Appeals a motion for rehearing or to transfer the case to the Supreme Court (R. 3). A copy of respondent's motion was personally served on petitioner Osborne, who acknowledged receipt of service by his signature thereon.[1] The Kansas City Court of Appeals overruled respondent's motion (R. 4) and respondent then duly filed in the Supreme Court of Missouri an application to transfer the cause to the Supreme Court (R. 2). Petitioner Osborne was personally served with the notice of respondent's application to transfer and supporting documents on February 26, 1953, but refused to acknowledge service thereof. An affidavit of service was therefore filed in the Supreme Court (Appendix, p. 26). On March 9, 1953, the Supreme Court

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[1]Appendix, p. 25. Inasmuch as petitioner, without the agreement of respondent, has omitted from the printed transcript certain portions of the record, including the proof of service of respondent's motions and applications for transfer (R. 1, 4), and because petitioner urges lack of notice of the proceedings in the Supreme Court, these omissions are supplied in the appendix to this brief.

ordered the cause transferred to the Supreme Court, numbered 43,666, and further ordered that the cause be consolidated with *Duke W. Ponick* v. *Arvid Owsley*, 43,667 (R. 5-6).

The Supreme Court docketed the two consolidated cases for hearing and oral argument on October 1, 1953, and petitioner Osborne was duly notified by the Clerk of the Supreme Court of Missouri of the date of hearing about July 10, 1953, at least eighty days prior to the date of hearing (Appendix, p. 27). Petitioner did not file a brief in the Supreme Court of Missouri, although under Missouri practice (Supreme Court Rule 2.06) he retained his position as the moving or petitioning party. Petitioner Ponick in cause No. 43,667 filed a brief in the Supreme Court, and respondent filed a brief in response to Ponick's brief. Although not required to do so, respondent served two copies of his brief in the *Ponick* case on petitioner Osborne by sending two copies to him at his place of abode, 3600 Genesee Street, Kansas City, Missouri, by registered mail, return receipt requested.[2] The briefs were returned marked "Unclaimed" (Appendix, p. 29).

Although petitioner Osborne had full and ample notice of the date of hearing in the Supreme Court, he failed to appear at the hearing and oral argument in the Supreme Court on October 1, 1953. The Supreme Court of Missouri on January 11, 1954, held that the Writs of Habeas Corpus in the *Osborne* and *Ponick* cases were improvidently issued by the Court of Appeals and ordered said writs quashed (R. 96-98; 264 S. W. 2d 332). The Supreme Court held that criminal contempt proceedings were *sui generis* and that the Missouri misdemeanor statute of limitations did not apply thereto. None of the constitutional questions

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[2]The same address, 3600 Genesee Street, Kansas City, Missouri, is represented as petitioner's present address in documents filed in this Court. See petitioner's notice of filing petition for writ of certiorari.

now asserted by petitioner were raised in or decided by the Supreme Court.

For the first time after petitioner's initial pleadings were filed in the Court of Appeals, petitioner put in his appearance in the Supreme Court of Missouri on January 26, 1954, and filed a motion for rehearing, which the court denied generally on February 8, 1954 (R. 99-112). The Supreme Court of Missouri did not expressly consider petitioner's belated claim of denial of constitutional rights in overruling his motion for rehearing (R. 112).

It is apparent from the record herein that petitioner was in default both in the Court of Appeals and in the Supreme Court and had failed to preserve for decision in those courts the constitutional questions now asserted. When petitioner finally appeared, too late, in the Supreme Court of Missouri on motion for rehearing, he took the position that he was entitled to his discharge on the pleadings (R. 104, 110).

The facts of this case and the questions asserted by petitioner herein are not new or novel to this Court. Petitioner himself has asserted in a previous proceeding for a writ of certiorari in this Court to review habeas corpus and contempt proceedings substantially similar in all respects to the present proceeding that, "Other charges of contempt were filed against the lawyers and they are charged with other offenses yet to be tried; *a decision in this case will determine their guilt or innocence in all of said contempt charges* * * *"[3] Moreover, petitioner also asserted in his Petition for a Writ of Certiorari in this Court's No. 717 that "Since then petitioner Osborne has

[3] *Osborne, et al.* v. *Purdome, Sheriff*, No. 717, facts and opinions reported at 244 S. W. 2d 1005; certiorari denied, May 19, 1952, 343 U. S. 953, 72 S. Ct. 1046; rehearing denied, June 9, 1952, 343 U. S. 988, 72 S. Ct. 1069. The quotation appears on page 5 of petitioner's' Motion for 20 Days Extension of Time within Which to Print Record and File Petition for Writ of Certiorari, filed April 7, 1952.

been adjudged guilty of two other constructive contempts and sentenced to ten months in jail and also 360 days in jail and fined; *that all charges of contempt against him are substantially identical*" (p. 5). It is also highly significant that petitioner's brief in support of his petition for certiorari herein makes the same arguments and cites the same authorities as in the former case.[4] Petitioner thus urged in his former petition that a decision therein would be decisive of the present proceedings, and advanced substantially identical legal arguments in support of both petitions. Petitioner, therefore, has presented no novel or substantial federal question or any question of general importance which would merit review by this Court.

[4]The brief herein (pp. 19-22) is virtually identical, even with respect to typographical errors, with petitioners' supplemental brief in No. 717 (pp. 12-14).

## ARGUMENT.

### I.

The proceedings in the Supreme Court of Missouri reviewing petitioner's discharge under Writ of Habeas Corpus did not by reason of any lack of notice deny petitioner due process of law. As a matter of law petitioner was not entitled to be served with notice that the Supreme Court had assumed jurisdiction of the case. Moreover, petitioner actually received adequate notice at every step in the proceedings.

a. *No notice was necessary:* The habeas corpus proceedings in the Kansas City Court of Appeals in the present case were transferred to the Supreme Court under and in strict compliance with the procedure established by the Missouri Constitution and Rules of the Supreme Court (Article V, Sections 4, 10, Missouri Constitution of 1945; Supreme Court Rule 2.06). The transfer under this procedure is not an appeal, but is on a basis similar to the transfer of a case from a division of the Supreme Court to the Court *En Banc* (*State* v. *White,* 336 Mo. 83, 248 S. W. 2d 841), and petitioner, who instituted the habeas corpus proceedings in the Court of Appeals, retained the same position as the moving or petitioning party after the case was transferred to the Supreme Court of Missouri (Supreme Court Rule 2.06). The Supreme Court has the power to determine finally all cases transferred to it from any Court of Appeals, the same as on an original appeal, and is not limited to the issues decided by the Court of Appeals (Article V, Section 10, Missouri Constitution of 1945). In view of the nature of the review proceedings here involved, it seems obvious that petitioner, who retained the status of petitioner of complainant at all stages in the proceedings, was not entitled to notice of

the successive steps in the same proceedings, other than, perhaps, the notice that respondent had requested the Supreme Court to transfer the case. No other or additional notice is required by constitution, statute, or rule in Missouri, and petitioner has not attacked the Missouri review procedure itself as denying due process.

As the moving or petitioning party, petitioner had come into court seeking judicial redress, and he was chargeable as a matter of law with notice of all subsequent steps taken in his case, even though he did not in fact appear and had no actual notice thereof.

*Pennoyer* v. *Neff,* 95 U. S. 714, 734, 24 L. Ed. 565:

"It is hardly necessary to observe, that in all we have said we have had reference to proceedings in courts of first instance, and to their jurisdiction, and not to proceedings in an appellate tribunal to review the action of such courts. The latter may be taken upon such notice, personal or constructive, as the State creating the tribunal may provide. They are considered as rather a continuation of the original litigation than the commencement of a new action."

*State ex rel. Anderson Motor Service Co.* v. *Public Service Comm.,* 339 Mo. 469, 97 S. W. 2d 116, 119 *(en banc).*

*McCormick* v. *Stephens,* 141 Mo. App. 236, 124 S. W. 1076.

*Brown & Bennett* v. *Powers,* 146 Ia. 729, 125 N. W. 833.

*Jones* v. *Mould,* 151 Ia. 599, 132 N. W. 45.

*Smith* v. *Apple,* 6 F. 2d 559, 564 (C. C. A. 8).

*Cukor* v. *Cukor,* 114 Vt. 456, 49 A. 2d 206, 209:

"Due process does not require that personal service shall be made upon a party where the proceeding is only a continuation of litigation which is already within the jurisdiction of the Court."

66 C. J. S., Notice, Section 12, P. 648.

Due process of law does not require that notice be given of proceedings for review such as the proceedings involved in the present case. In *Brown & Bennett* v. *Powers,* 146 Ia. 729, 125 N. W. 833, defendants had originally been discharged in a contempt proceeding against them and the Supreme Court of Iowa on certiorari (a procedure which was not technically an appeal and was somewhat analogous to the transfer procedure in Missouri) annulled the order of the trial court, which thereafter found defendants guilty of contempt. Defendants then initiated certiorari proceedings and claimed that they were not parties to the prior certiorari proceedings, had no notice of such proceedings, were not bound thereby, and that the prior certiorari proceedings deprived them of their rights without due process of law. With respect to this contention the Supreme Court of Iowa held in modifying and affirming the order of the trial court (835):

> "It is sufficient to say that we think no constitutional right of the petitioners is violated either by the statute or by the order of the trial court. The statutory proceedings for the review of the judgment of the lower court are essentially a part of the original proceedings, regardless of the particular form of such proceedings. Being statutory, all parties have notice in advance, and are charged with the burden of ascertaining the status of their case in all its stages. Whether formal notice should be given for the purpose of obtaining a review is a question wholly of legislative discretion. In regular appeals such notice is provided for. But such notice is not essential to the constitutionality of the statute conferring the right of appeal."

The decision in the *Powers* case was followed in *Jones* v. *Mould,* 151 Ia. 599, 132 N. W. 45, in which the Iowa Supreme Court again pointed out that the contemnor had

advance notice of the statutory proceedings available for review of the contempt order and that he was not denied due process even though he was not a nominal party to the certiorari proceedings.

So, in the present case, the transfer proceedings are "statutory" and petitioner Osborne had notice in advance of the procedures provided by Missouri law for review and correction by the Supreme Court of the error of the Court of Appeals. *State ex rel. Anderson Motor Service Co.* v. *Public Service Comm.*, 339 Mo. 469, 97 S. W. 2d 116 (*en banc*), answers all of petitioner's objections concerning lack of notice. Appellants there had been granted a trucking permit after notice and a hearing before the Commission. Pursuant to statute, relator applied to the Circuit Court for review by certiorari of the Commission's order. Appellants were not named as parties in the Circuit Court, were not served with notice of the certiorari proceedings, and concededly had no knowledge of them until after the trial court reversed the Commission's order. The statute gave appellant the right to appear in the review proceedings, but did not provide for notice of the initiation or pendency of the review proceedings. The Supreme Court pointed out that the statute contemplated that interested parties must take notice and keep themselves informed of the subsequent steps provided by the statute, and rejected appellant's contention of denial of due process, holding at 119:

> "Appellants had due notice of all proceedings before the commission and appeared and were heard there. They knew, because the statute informed them, that any party to the proceedings before the commission might demand, and would thereupon be entitled to, a review of the commission's order. They knew the time and manner and the court in which such review might be demanded, and that, on such review, the

> commission's order might be set aside. They had the right, by statute, to appear and to be heard in such review proceeding and to appeal from the judgment of the court. In these circumstances we think the constitutional requirements of due process invoked by appellants were satisfied."

*Griffin* v. *Griffin,* 327 U. S. 220, 66 S. Ct. 556, and other cases cited by petitioner (Pet. pp. 15-16) all involved *separate* proceedings after judgment in which substantive rights were affected which were not and could not have been in issue in or affected by the original proceedings. The decision of the Supreme Court of Missouri herein was clearly a continuation of the original litigation, and did not affect any rights now asserted by petitioner which he could not have asserted in that Court by properly preserving his constitutional questions.

Petitioner's claim that the judgment of the Court of Appeals was *res judicata* and barred further proceedings ignores the controlling factor that the judgment was not a *final* judgment until the time prescribed for motion for rehearing and application to transfer had expired. See *State* v. *White,* 336 Mo. 83, 248 S. W. 2d 841, 842 (Div. 1, 1952), a criminal case:

> "The finality of the judgment of a court of appeals immediately upon the filing of an opinion, is prevented by Sec. 10, Art. V, which provides for transfer to the Supreme Court by order of the Court of Appeals or of the Supreme Court. Such an order must be made within a reasonable time and that time has been fixed by Supreme Court Rule 2.06 as authorized by the Constitution. Furthermore, it has long been established that an opinion of an appellate court does not become the decision of the court upon which a final judgment can be entered until the disposition of a pending motion for rehearing * * * (Citing cases). The provisions of Article V of the 1945

Constitution establish an integrated system of appellate courts so that transfer of a case from a court of appeals is on a basis similar to a transfer from a Division of the Supreme Court to the Court *en banc.* See Sec. 9, Art. V."

b. *Petitioner had adequate notice:* Although petitioner was not entitled to any notice, except perhaps notice of the original application of respondent to transfer the proceeding to the Supreme Court, the record herein shows that petitioner had abundantly adequate notice of all proceedings both in the Court of Appeals and in the Supreme Court of Missouri.

1. Petitioner was personally served with respondent's motion for rehearing or, in the alternative, to transfer to the Supreme Court, which was filed in the Kansas City Court of Appeals on December 23, 1952, and petitioner signed an acknowledgment of receipt thereof (Appendix, p. 24; Tr. 3-4).

2. Respondent's application for transfer to the Supreme Court and notice thereof, together with supporting documents, were filed in the Supreme Court of Missouri on March 3, 1953, after having been personally served on petitioner in his cell at the Jackson County jail on February 26, 1953. Petitioner refused to acknowledge receipt of these documents, so an Affidavit of Service was prepared and filed in the Supreme Court (Appendix, p. 26; Tr. 1).

3. There is no Missouri statute or rule requiring that the Supreme Court notify petitioner of its order transferring his case to the Supreme Court. Supreme Court Rule 1.07, however, provides in part that, "The parties shall be notified by the Clerk of the Appellate Court of the date of the hearing at least thirty days before the date on which the appellant's brief is required to be served."

The Clerk of the Supreme Court of Missouri customarily notifies the attorneys or parties of record in cases pending before the Supreme Court of the date of hearing at least eighty days prior to that date by mailing them a copy of the printed docket of the Supreme Court. This customary procedure was followed in the present case, and the Deputy Clerk of the Supreme Court notified petitioner Osborne about July 10, 1953, that his case, No. 43,666, was set for hearing on October 1, 1953, by mailing a copy of the Supreme Court docket to his home address, postage prepaid (Appendix, p. 27).

4. At no time after the initial pleadings were filed in the Court of Appeals did petitioner appear either in that Court or in the Supreme Court, and he filed no briefs in either court. Respondent was not therefore called upon to file a responsive brief in his case. Briefs were filed in the Supreme Court by both parties in the companion case of *Duke W. Powick* v. *Arvid Owsley*, No. 43,667, and respondent as a courtesy to petitioner mailed two copies of respondent's brief in the *Powick* case to petitioner's regular and present place of abode, 3000 Genesee Street, Kansas City, Missouri, by registered mail. However, the envelope containing the brief was returned marked "Unclaimed" (Appendix, p. 29).

It is apparent, therefore, that respondent and the Supreme Court complied to the letter with the statutory procedure in the proceedings transferring this case to the Supreme Court, and that petitioner had adequate notice of every step in the proceedings, but deliberately chose not to appear in the Court of Appeals or in the Supreme Court, apparently in the hope that by burying his head in the sand he could create a constitutional question.

## II.

Petitioner's claim of prejudice is baseless, but even if it be assumed *arguendo* that the claim has any merit, petitioner has failed to preserve and has abandoned it. After the initial pleadings in the Court of Appeals, petitioner did absolutely nothing until he filed his motion for rehearing in the Supreme Court over a year and a half later. He did not appear on the date set for oral argument in the Court of Appeals, he filed no briefs in the Court of Appeals, he at no time appeared in either the Court of Appeals or the Supreme Court nor did he at any time request the appointment of a special commissioner to hear testimony, and he filed no brief in the Supreme Court until after its decision quashing the Writ of Habeas Corpus. Petitioner has therefore as a matter of law waived and abandoned all contentions relating to prejudice of the trial court, and to petitioner's being denied due process or equal protection thereby. Even in a criminal prosecution, the right to disqualify a judge may be waived. *State* v. *Perkins*, 339 Mo. 27, 95 S. W. 2d 75, 77 (*en banc*).

Under Missouri procedure in habeas corpus proceedings such as this one in appellate courts, unless the petitioner requests the appointment of a commissioner to take testimony on issues of fact at the date set for hearing, he waives that right. In that event the *allegations of the petition may be considered only so far as they are sustained by the judgment and commitment. Ex parte Clark*, 336 Mo. 121, 106 S. W. 980 (*en banc*) was an original habeas corpus proceeding in the Supreme Court to review the commitment of an attorney for criminal contempt. Petitioner's reply to the Sheriff's return requested the appointment of a commissioner to take testimony on controverted fact issues, but petitioner's counsel appeared at the hearing and submitted the cause on brief and oral

argument. In neither did petitioner press the request for the appointment of a commissioner, and the court also pointed out that, by implication, the cause was submitted on the theory that only questions of law were involved. The Supreme Court held (p. 995):

> *"Petitioner, by waiving an order for the appointment of a commissioner to take testimony to establish such facts, if any, thereby elected to go on without them, i.e., he elected to stand on the record facts, if stand he can at all. Having made that election, he must abide it."* (Emphasis supplied.)

The Court further held that they would consider the case on the theory that the allegations of the petition were taken as true, *"only so far as sustained by the recitals in the judgment and the commitment"* (p. 996). (Emphasis supplied.)

Here, petitioner did not even appear in either appellate court, and thereby chose to stand on the record facts alone. The trial court considered and overruled all petitioner's petitions and motions raising the question of prejudice in fact of the trial judge (R. 67), and therefore none of the allegations of the petition for habeas corpus and exhibits thereto which relate to prejudice are "sustained by the recitals in the judgment and order of commitment." None of the constitutional or other questions now asserted by petitioner were properly before the Supreme Court of Missouri for decision, nor will they support the jurisdiction of this Court.

It is well settled that constitutional questions must not only be timely raised but must also be preserved throughout the state court proceedings in accordance with state procedure, in order for a federal constitutional question to be properly before the Supreme Court for decision. *See Parker* v. *Illinois*, 333 U. S. 571, 68 S. Ct. 708; *Bailey* v.

*Anderson*, 326 U. S. 203, 206-7; 66 Sup. Ct. 66; *CIO* v. *McAdory*, 325 U. S. 472, 477, 65 S. Ct. 1395; *Harding* v. *Illinois*, 196 U. S. 78, 84, 25 S. Ct. 176 (Failure to cite authorities or advance argument in support of constitutional objection as required by state practice.) Petitioner could have preserved his claims based on the Federal Constitution by briefs, argument, and a request for a hearing of evidence either in the Court of Appeals or in the Supreme Court, but chose to default in both courts. It is well-settled in Missouri that failure to brief and argue questions which have been raised below, even constitutional questions, constitutes an abandonment of such questions in the Court of Appeals or in the Supreme Court.

*Tureman* v. *Altman*, 361 Mo. 1220, 239 S. W. 2d, 304, 308 (*en banc*).
*Merrick* v. *Bridgeways, Inc.*, 362 Mo. 476, 241 S. W. 2d 1015, 1019 (Div. 1).
*Jones* v. *Giannola*, 252 S. W. 2d 660, 663 (St. Louis App.) (No official report).
*Baker* v. *Atkins*, 258 S. W. 2d 16, 22 (K. C. App.) (No official report).

It was too late for petitioner to attempt to revive his claimed constitutional questions by argument in his motion for rehearing in the Missouri Supreme Court inasmuch as that Court overruled the motion generally without explicitly determining the constitutional questions.

*Consolidated Turnpike Co.* v. *Norfolk & Ocean View Ry. Co.*, 228 U. S. 326, 334, 33 S. Ct. 510.
*Radio Station WOW* v. *Johnson*, 326 U. S. 120, 128, 65 S. Ct. 1475.
*Mergenthaler Linotype Co.* v. *Davis*, 251 U. S. 256, 258, 40 S. Ct. 133.
*Weatherford* v. *Spiritual Christian Union Church*, 163 S. W. 2d 916, 919 (Div. 2) (No official report).
*Flint* v. *Loew's St. Louis Realty & Amusement Corp.*, 344 Mo. 310, 126 S. W. 2d 193 (Div. 2).

This Court has held that a judge should not be driven from the bench by such aggravated personal attacks on the judge by a contemnor as occurred in this case, which are made in order to drive the judge out of the case for ulterior reasons. *Cooke* v. *United States,* 267 U. S. 517, 539, 45 S. Ct. 390.[5] The contempts charged did not involve personal criticism or disrespect of the trial court, which would disqualify the judge under Rule 35.01 (Appendix, p. 33) of the Rules of Criminal Procedure of Missouri. The Supreme Court of Missouri, in review of contempt proceedings against this petitioner, has twice held that the Missouri statutes providing for the right to change of venue in civil and criminal cases on filing of affidavits of prejudice of the trial judge do not apply to criminal contempt proceedings, and under Missouri law petitioner was not entitled as a matter of law to a change of judge herein. *Osborne* v. *Purdome,* 244 S. W. 2d 1005, 1013, cert. den. 343 U. S. 953; *Osborne* v. *Purdome,* 250 S. W. 2d 159, 160-61 (No official report). The Missouri Supreme Court also held in the foregoing cases that the denial of a change of judge did not deprive petitioner of due process of law. It is clearly not a denial of procedural due process for the judge to hear and decide the constructive contempt proceedings that arose in his court. See *Higgins* v. *United States,* 160 F. 2d 223 (App. D. C.), cert. den. 331 U. S. 840.

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[5]Prejudice of the trial judge seems a routine assertion of Petitioner in these contempt proceedings, regardless of the judge involved. See *Osborne* v. *Purdome,* 250 S. W. 2d 159, and *Osborne* v. *Purdome,* 244 S. W. 2d 1005, cert. den. 343 U. S. 953 (which involved almost identical charges) in which the Supreme Court rejected claims of prejudice made against two other Jackson County, Missouri, Circuit Judges as being without factual support in the record of the contempt proceedings.

## III.

Petitioner's other contentions involve no federal questions and may be disposed of summarily. With reference to the claim that no contempt was alleged or proved, the Missouri Supreme Court *en banc* in *Osborne* v. *Purdome,* 244 S. W. 2d 1005, 1014, on substantially identical facts and charges held to the contrary. See also the decision below, 264 S. W. 2d 332. So long as a state does not lay hold of *innocent conduct* as an arbitrary pretense for arbitrary punishment as contempt, "What constitutes contempt, as well as the time during which it may be committed, is a matter of local law." *Patterson* v. *Colorado,* 205 U. S. 454, 461, 27 S. Ct. 556.

To the same effect is *Skinner* v. *Oklahoma,* 316 U. S. 535, 540, 62 S. Ct. 1110: "Thus, if we had here only a question as to a State's classification of crimes, such as embezzlement or larceny, no substantial federal question would be raised."

Due process of law and equal protection of the laws do not necessitate that persons charged with criminal contempt be given a jury trial and other procedural safeguards applicable to criminal prosecutions. *Eilenbecker* v. *District Court of Plymouth County, Iowa,* 134 U. S. 31, 10 S. Ct. 424; *Myers* v. *United States,* 264 U. S. 95, 104-105, 44 S. Ct. 272; *United States* v. *United Mine Workers of America,* 330 U. S. 258, 298, 72 S. Ct. 925. Due process does not require a trial by jury even in a state criminal prosecution. *Jordan* v. *Massachusetts,* 225 U. S. 167, 32 S. Ct. 651.

## IV.

This case does not involve any question of substance or of general importance. Petitioner has heretofore presented to this Court the same questions in a case which pe-

titioner himself contended involved "substantially identical" charges, and in which he represented to this Court that the decision therein would determine his guilt or innocence in other contempt charges including the present one.[6] In the previous Osborne petition in this Court, he raised questions concerning (1) his constitutional right to a change of judge based on his allegations of prejudice, (2) his right to trial by jury, and (3) whether the charged conduct could constitute contempt of court, all of which he also relies upon in his present petition.

The Fourteenth Amendment to the Constitution of the United States does not straitjacket a state in classifying as contempt nefarious conduct striking at the very heart of the administration of justice such as is here involved or in providing procedures to deal with such conduct, but requires simply that persons charged with indirect criminal contempt be given reasonable notice and a fair hearing. The record in this case established that petitioner had adequate notice at every stage in the proceedings and had a full and fair hearing—that his constitutional rights were fully protected in the contempt and habeas corpus proceedings.

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[6] *Osborne* v. *Purdome*, 244 S. W. 2d 1005, cert. den. 343 U. S. 953, rehearing den. 343 U. S. 988.

**Conclusion.**

The judgment below was correct and all procedures applicable to contempt and habeas corpus proceedings were carefully observed. Petitioner has neither preserved nor presented to this Court any federal question, or any question of substance or general importance. We therefore respectfully submit that the petition for writ of certiorari should be denied.

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## Appendix.

(Filed Mar. 18, 1953, Marion Spicer, Clerk, Supreme Court)

(Caption omitted)

(Filed Dec. 23, 1952, Renick Jones, Clerk, Kansas City Court of Appeals.)

### Respondent's Motion for Rehearing or, in the Alternative, to Transfer to the Supreme Court.

Comes now respondent and respectfully moves the Court to grant a rehearing in this cause or, in the alternative, to transfer this cause to the Supreme Court of Missouri upon the following grounds:

1. Respondent has this day filed a Motion for Rehearing or to Transfer to the Supreme Court together with Suggestions in Support of the Motion in *Ex Parte Duke W. Ponick* v. *J. A. Purdome,* No. 21,811. This cause involves the exact question presented in *Ex Parte Duke W. Ponick* v. *J. A. Purdome,* No. 21,811.

2. Respondent, therefore, to avoid duplication, respectfully requests the Court to consider the Motion and Supporting Suggestions which are filed in *Ex Parte Duke W. Ponick* v. *J. A. Purdome,* No. 21,811, as Respondent's Motion and Supporting Suggestions in this cause as though filed herein.

Respectfully submitted,

(Signed) CARL E. ENGGAS
CARL E. ENGGAS

(Signed) JAMES A. MOORE
JAMES A. MOORE

(Signed) DAVID M. PROCTOR, JR.
David M. Proctor, Jr.,
*Amici Curiae.*

(Signed) HENRY H. FOX, JR.
HENRY H. FOX, JR.,
*Of Counsel.*

Received a copy of the above Motion and of Respondent's Motion and Suggestions in Support thereof filed in Ex Parte Duke W. Ponick v. J. A. Purdome, No. 21,811, this 23 day of December, 1953.

(Signed) ALFRED H. OSBORNE.
ALFRED H. OSBORNE.

STATE OF MISSOURI—Set.

I, Marion Spicer, Clerk of the Supreme Court of the State of Missouri, hereby certify the above and foregoing to be a full, true and correct copy of Respondent's Motion for Rehearing or, in the alternative, to Transfer to the Supreme Court, in a cause entitled Ex Parte Alfred H. Osborne, petitioner, vs. J. A. Purdome, Sheriff of Jackson County, Missouri, respondent, No. 43,666, as fully and completely as the same appears of record and on file in my office.

In Testimony Whereof I hereunto set my hand and affix the seal of said Supreme Court at my office in the City of Jefferson, State aforesaid, this 3rd day of July, 1954.

(Signed) MARION SPICER,
Clerk of Supreme Court of
State of Missouri.

(Filed Mar. 3, 1953, Marion Spicer, Clerk, Supreme Court)
(Caption omitted)

**Notice of Application of Respondent, Arvid Owsley, for Transfer to the Supreme Court.**

To Alfred H. Osborne and to Renick Jones, Clerk of the Kansas City Court of Appeals:

You, and each of you, are hereby notified that Respondent in Cause No. 21,814, habeas corpus, in the Kan-

sas City Court of Appeals, entitled Ex Parte Alfred H. Osborne, Petitioner, vs. Arvid Owsley, Sheriff, Respondent, will file in the Supreme Court of Missouri Application for Transfer of this cause to the Supreme Court of Missouri on March 4, 1953. A copy of said Application, including supporting suggestions, and a true copy of the opinion of said Court of Appeals and of respondent's motion for rehearing or to transfer to said Court, and the ruling thereon, is delivered to you herewith.

(Signed) CARL E. ENGGAS
CARL E. ENGGAS

(Signed) JAMES A. MOORE
JAMES A. MOORE

(Signed) DAVID M. PROCTOR, JR.
David M. Proctor, Jr.,
*Amicus Curiae.*

(Signed) RICHARD K. PHELPS
RICHARD K. PHELPS
*Counsel.*

The undersigned hereby acknowledge receipt of the above notice and of copies of the application for transfer and supporting documents above mentioned, this 26 day of February, 1953.

(Signed) RENICK JONES,
Clerk of the Kansas City
Court of Appeals.

ALFRED H. OSBORNE.

(Filed Mar. 3, 1953, Marion Spicer, Clerk, Supreme Court)
(Caption omitted)

**Affidavit of Service.**

STATE OF MISSOURI, }
COUNTY OF JACKSON, } ss.

MELVIN J. SPENCER, being duly sworn, deposes and says that he served a copy of the foregoing Notice, together with copies of the application for transfer to the Supreme Court of Missouri and supporting documents mentioned in said Notice by delivering copies thereof to Alfred H. Osborne in his cell at the Jackson County Jail at Kansas City, Missouri, on the 26th day of February, 1953.

(Signed) MELVIN J. SPENCER.

Subscribed and sworn to before me this 27th day of February, 1953.

(SEAL) (Signed) ROSEMARY F. NUGENT,
Notary Public.

My Commission Expires: Nov. 30, 1955.

STATE OF MISSOURI—Set.

I, Marion Spicer, Clerk of the Supreme Court of the State of Missouri, hereby certify the above and foregoing to be a full, true and correct copy of the Notice of Application of Respondent, Arvid Owsley, for Transfer to the Supreme Court, and Affidavit of Service, in a cause entitled Ex Parte Alfred H. Osborne, petitioner, vs. Arvid Owsley, Sheriff of Jackson County, Missouri, respondent,

No. 43,666, as fully and completely as the same appear of record and on file in my office.

IN TESTIMONY WHEREOF I hereunto set my hand and affix the seal of said Supreme Court at my office in the City of Jefferson, State aforesaid, this 3rd day of July, 1954.

(Signed) MARION SPICER,
Clerk of Supreme Court of
State of Missouri.

(Caption omitted)

**Affidavit.**

STATE OF MISSOURI,
COUNTY OF COLE, } ss.

Helen Green, of lawful age, being first duly sworn upon her oath, states as follows:

1. She is and at all times during the year 1953 was a Deputy Clerk of the Supreme Court of the State of Missouri.

2. It is a part of the customary procedure of the office of the Clerk of the Supreme Court of the State of Missouri, and a part of her regular duties, to notify the attorneys of record, or if none, the parties of record, in all cases pending in the Supreme Court of Missouri, of the date of the hearing of such cases at least eighty (80) days before the date of hearing, by mailing to them a copy of the printed docket of the Supreme Court.

3. On or about July 10, 1953, and at least eighty (80) days prior to October 1, 1953, she notified Petitioner Alfred H. Osborne that the date of the hearing in the case of *Alfred H. Osborne, Petitioner,* v. *Arvid Owsley, Sheriff of Jackson County, Missouri, Respondent,* No.

43,666, would be October 1, 1953, by depositing a printed copy of the docket of the Supreme Court of Missouri, en banc, September Session, 1953, in the United States mail postage prepaid, in a sealed envelope addressed to Alfred H. Osborne, 3600 Genesee, Kansas City, Missouri; and that said case No. 43,666 was listed on Page 2 of said printed docket for hearing on October 1, 1953.

4. That the return address of the Clerk of the Supreme Court, Jefferson City, Missouri, was plainly printed in the upper left hand corner of said envelope, and that said envelope was not returned to the office of the Clerk of the Supreme Court of Missouri.

(Signed) Helen Green

Subscribed in my presence and sworn to before me this 3rd day of July, 1954.

(Signed) Marion Spicer,
Clerk of the Supreme Court of Missouri.

**Certificate.**

I hereby certify that Helen Green is now and continuously during the year 1953 was a Deputy Clerk of the Supreme Court of Missouri.

Dated: July 3, 1954.

Marion Spicer, Clerk of the Supreme Court of Missouri.

State of Missouri—Set.

I, Marion Spicer, Clerk of the Supreme Court of the State of Missouri, hereby certify the above and foregoing to be a full, true and correct copy of Affidavit of Helen Green filed July 3, 1954, in a cause entitled Alfred H.

Osborne, petitioner, vs. *Arvid Owsley, Sheriff of Jackson County, Missouri*, respondent, No. 41,686, as fully and completely as the same remains of record and on file in my office.

Witness my hand and seal of said Supreme Court of Missouri, this 3rd day of July, 1954.

(Signed) Ruben Steers,
Clerk of the Supreme Court of Missouri.

(Caption omitted)

**Affidavit.**

State of Missouri, } ss.
County of Jackson, }

Carl E. Enggas, of lawful age, being first duly sworn upon his oath, states that he is one of the Assistant Counsel and counsel for Respondent in the above captioned case; that on or about September 10, 1953, he served on Petitioner Alfred H. Osborne, two copies of the Brief of Respondent in the Supreme Court of Missouri, September Session, 1953, in the case of *Dale W. Pemick, Petitioner, v. Arvid W. Owsley, Sheriff of Jackson County, Respondent*, No. 41,687, by placing each copies in a sealed envelope addressed to Petitioner Alfred H. Osborne at his regular and present place of abode, 3939 Genesee, Kansas City, Missouri, and by depositing each envelope in the United States mail, postage prepaid, to be sent by registered mail, return receipt requested; that said envelope was returned to the sender during the month of October, 1953, with the following notation thereon: "Unclaimed October 1, 1953"; that said envelope is presently in the possession of Affiant, and Affiant will produce or

forward the same to the Court for inspection upon t
request of the Court.

(Signed) Carl. E. Engg
Carl E. Engg

Subscribed and sworn to before me this 2nd day
July, 1954.

(Signed) Rosemary F. Nugent,
Notary Public in and for sa
County and State.

My Commission expires: Nov. 30, 1955.

State of Missouri—Set.

I, Marion Spicer, Clerk of the Supreme Court of t
State of Missouri, hereby certify the above and foregoi
to be a full, true and correct copy of the Affidavit
Carl E. Enggas, filed July 3, 1954, in a cause entitl
Alfred H. Osborne, petitioner, vs. Arvid Owsley, Sheri
of Jackson County, Missouri, respondent, No. 43,666,
fully and completely as the same remains of record a
on file in my office.

Witness my hand and seal of said Supreme Court
Missouri, this 3rd day of July, 1954.

(Signed) Marion Spicer,
Clerk of Supreme Court
Missouri.

**Constitutional Provisions and Rules Cited**

Article V, Secs. 4 and 10, Missouri Constitution of 1945; See petitioner's brief, p. 39.

Rule 2.06, Rules of the Supreme Court of Missouri; 2 R. S. Mo. (1949), 4105:

Transfers from Courts of Appeals. No case shall be transferred by order of the Supreme Court from a Court of Appeals unless a motion for rehearing has been filed and overruled in the Court of Appeals and unless a motion for such transfer has been made to the Court of Appeals within the time for filing a motion for rehearing and denied by it, and unless an application for transfer is filed in the Supreme Court within thirty days after the denial of the motion for rehearing and motion for transfer by the Court of Appeals. The motion for transfer filed in the Court of Appeals may be joined with a motion for rehearing and a rehearing or transfer may be prayed for in the alternative. At least five days' notice of such application shall be given to all parties adversely affected, or their attorneys, and to the clerk of the Court of Appeals.

The application may be printed or typewritten and shall not exceed six pages. It shall set out concisely the question of general interest or importance involved in the case, or why re-examination of the existing law is required, or wherein the Court of Appeals has failed or refused to follow the last controlling decision of the Supreme Court, concisely setting out the issue presented to the Court of Appeals and showing wherein and in what manner the alleged conflicting ruling arose and stating the citation of the controlling decision. The application may allege more than one ground either concurrently or in the alternative. No application will be granted unless it shows that a question of general interest and importance is

presented which has not previously been decided by the Supreme Court, or shows reasonable grounds for holding the existing law to be erroneous, or shows that the Court of Appeals has failed or refused to follow the last controlling decision of the Supreme Court. The application shall be accompanied by a true copy of the opinion of the Court of Appeals in said cause, and copies of the motion for rehearing and the motion for transfer in the Court of Appeals and the rulings thereon.

Suggestions in support of the application, not to exceed six pages, may be filed.

The notice may be printed or typewritten, and shall be accompanied by a true copy of the application and all exhibits and suggestions in support. Any party adversely affected may file, on or before the date fixed by the notice, counter-suggestions of not more than six pages, and shall serve a copy on the applicant or his attorney.

If the application be granted, the transcript on appeal filed in the Court of Appeals, together with any other papers filed in the Supreme Court, shall constitute the transcript on appeal in the Supreme Court, and no new transcript on appeal need be filed. Briefs filed in the Court of Appeals shall be filed in the Supreme Court, and no new briefs need be prepared, but parties may file additional briefs if they desire to do so.

A petition for certiorari on the ground of conflict of decision will be considered as an application to transfer and must comply with the requirements of this rule.

A Court of Appeals at any time within fifteen days after adopting an opinion, if no motion for rehearing or transfer is filed, or at any time during the pendency of such a motion, may on its own motion order a case transferred to the Supreme Court in accordance with Section 10 of Article V of the Constitution. The provisions of this rule relating to the transcript on appeal and briefs in the

Supreme Court shall, so far as possible, apply to cases so transferred.

Any case coming to the Supreme Court after having been briefed on the merits in, and decided by, a court of appeals will be finally determined by the Supreme Court the same as on original appeal, whether such case comes to it by certification, transfer or certiorari. For the purpose of filing additional briefs, if any, and for oral argument, the parties shall retain the same position as appellant and respondent as in the Court of Appeals. If additional briefs are filed, the time for service and filing thereof shall be governed by rule 1.09.

Rule 35.01, Rules of Criminal Procedure, Supreme Court of Missouri:
R. S. Mo. (1953 Supp.), p. 779.

Contempt, Criminal — Summary Punishment — Order — Other Contempt Proceedings—Notice — Bail — Disqualification of Judge—Order. (a) A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record. (b) A criminal contempt except as provided in subdivision (a) of this Rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the prosecuting attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to admission to bail as provided in

these Rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a finding of guilt the court shall enter an order reciting the essential facts constituting the criminal contempt and fixing the punishment.